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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 469

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

—against—

THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as Wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as Vestrymen of said Church, and JAMES PERNETTE DEWOLFE as Bishop of the Diocese of Long Island,

Respondents.

BRIEF OF RESPONDENTS (OTHER THAN JAMES PERNETTE DE WOLFE) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE KIENDL,
WILLIAM R. MEAGHER,
Attorneys for Respondents other than James Pernette De Wolfe.

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Petitioners,

—against—

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Respondents.

BRIEF OF RESPONDENTS (OTHER THAN JAMES PERNETTE DE WOLFE) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Decisions and Opinions Below

Judgment in favor of respondents was entered (R. 136-140) upon the decision of the Supreme Court of the State of New York, County of Kings (R. 482-499) reported at 194 Misc. 1006.

The Appellate Division unanimously affirmed without opinion in a memorandum (R. 556) reported at 276 App. Div. 1008. Petitioners' motions in the Appellate Division for reargument, or in the alternative, for permission to appeal to the Court of Appeals, were denied in a memorandum reported at 277 App. Div. 783.

Petitioners thereafter appealed to the Court of Appeals without any permission (R. 549-550), presumably on the theory that there was "directly involved the construction of the constitution of the state or of the United States" (New York Civil Practice Act, Section 588, subd. 1(a)). The appeal was dismissed on respondents' motions by a unanimous Court of Appeals (R. 591) in a memorandum reported at 301 N. Y. 679:

> "Motions granted and appeal dismissed, with costs and $10 costs of motions, upon the ground that no constitutional question was properly raised in the courts below. (See *Matter of O'Neill* v. *Board of Regents*, 298 N. Y. 777; *Jongebloed* v. *Erie R. R. Co.*, 296 N. Y. 912; *City of New Rochelle* v. *Closter*, 296 N. Y. 506.)"

Statement as to Jurisdiction

Petitioners pray that a writ of certiorari issue to review the decision of the Court of Appeals dismissing their attempted appeal (Petition, p. 1). Jurisdiction to issue the writ is invoked under 28 U. S. Code, Section 1257(3) (Petition, p. 13).

Respondents submit that the petition should be denied (1) for want of jurisdiction and (2) for want of a substantial federal question (pp. 6-17, *infra*).

Statement of the Case

Petitioner John Howard Melish was until April 4, 1949 Rector of the Church of the Holy Trinity within the Episcopal Diocese of Long Island of which respondent James Pernette DeWolfe is Bishop. His son, petitioner William Howard Melish, was Assistant Minister of the Church. Respondents other than the Bishop were, at the commencement of this action, nine of eleven members of its Vestry. Petitioners Lewis Reynolds and Anna May Mason are Chairman and Co-Chairman respectively of a so-called "Committee to Retain our Rector".

When the Rector was ordained he took a vow according to the Book of Common Prayer:

> The Bishop: "Will you reverently obey your Bishop, and other Chief Ministers who, according to the Canons of the Church may have the charge and government over you; following with a glad mind and will their godly admonitions and submitting yourself to their godly judgments?"
>
> The Answer: "I will do so, the Lord being my helper." (Ex. 4, R. 150, not printed.)

On March 2, 1949 in proceedings initiated by the Vestry (Ex. 17, R. 155, printed at R. 508) and after hearings before the Standing Committee of the Diocese, at which petitioners appeared personally and by counsel (Ex. H, R. 176, not printed), the Bishop adjudged that the pastoral relations between the Church and the Rector should terminate on April 4, 1949 (Ex. 9, R. 152, printed at R. 44-45).

The Bishop's judgment was rendered in the exercise of jurisdiction conferred by Canon 27 of the Diocese of Long Island making him "ultimate arbiter and judge" in this precise kind of situation (R. 71-73).

The Bishop found, on evidence before the Standing Committee, "dissension in the Parish * * * due to the failure of the Rector to bring about the resignation or removal of the Assistant Minister", whose activities "have been most detrimental to the welfare not only of the Parish but also the Church in the Diocese and nation" (R. 33-34).

The Standing Committee found, and the Bishop approved the finding, that these activities comprised membership in and association with Communistic or pro-Communistic organizations "standing for principles incompatible with the Christian faith" (Ex. 7, R. 34-36). These activities were approved by the Rector (R. 36). By General Canon 45 of the Episcopal Church the Rector had sole and exclusive authority to end the Assistant Minister's tenure (Ex. 2, R. 149, not printed).

The Rector refused to obey the Bishop's judgment. He purported to call a special parish meeting for March 7, 1949 (Ex. 12, R. 153, printed at R. 51-54) at which "charges" were preferred against the nine respondent members of the Vestry who had voted to commence the proceedings before the Bishop (Ex. 12, R. 51-53). On these so-called "charges" they purportedly were removed from office (Ex. N, R. 423, printed at R. 73-83). Thereupon the Rector purported to call for March 14, 1949 another special parish meeting to elect their successors (R. 61).

Thus threatened with imminent, illegal deprivation of office, the nine respondent members of the Vestry commenced this action and were awarded judgment.

The judgment, in so far as appealed from, (1) declares that John Howard Melish ceased to be Rector on April 4, 1949—the date fixed by the Bishop's decision; (2) permanently enjoins petitioners from interfering with execution of the Bishop's judgment; (3) permanently enjoins the Rector from acting as such and from use, as Rector, of

the Church properties; and (4) dismisses petitioners' counterclaims and cross-claims which sought, in material part, (a) dismissal of the complaint and the Bishop's counterclaim; (b) a declaration that the Bishop's judgment is illegal; and (c) a permanent injunction against its enforcement (R. 69-70, 102-103, 133).

Proceedings Below After Judgment

The judgment having been affirmed by the Appellate Division, petitioners applied in that court for permission to appeal to the Court of Appeals. That very application indicated that the petitioners themselves were then unaware of the existence of any constitutional question which would have entitled them to appeal to the Court of Appeals as of right (Civil Practice Act, Section 588, subd. 1(a); compare Section 589).

It was only after the Appellate Division had denied leave to appeal to the Court of Appeals (277 App. Div. 783) that petitioners appealed to the Court of Appeals as of right (R. 449-550).

After the Court of Appeals had dismissed their appeal (301 N. Y. 679), petitioners could have applied to the Court of Appeals within thirty days thereafter for permission to appeal to that court (Civil Practice Act, Section 592, subd. 5(b)(ii)). However they elected to proceed as if the dismissal were a final judgment reviewable in this Court by writ of certiorari but, as we later demonstrate, in the very face of compelling authority to the contrary (pp. 6-7, *infra*).

I.

The order of the Court of Appeals dismissing petitioners' attempted appeal is not a final judgment.

The order of the Court of Appeals dismissing petitioners' attempted appeal is not a "final" judgment within the meaning of 28 U. S. Code, Section 1257(3). It is not a decision on the merits of the constitutional question allegedly raised (Petition, p. 2). It is merely a holding that, as no constitutional question had been properly raised in the lower courts, the appeal taken "as of right" to the Court of Appeals had to be dismissed.

As the order of dismissal is not a judgment "which disposes of the whole case on its merits, it is not final"; "a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this Court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case". *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4 (1882). See also:

Western Union Telegraph Company v. *Priester*, 276 U. S. 252, 258 (1928);

Norfolk & Suburban Turnpike Company v. *Commonwealth of Virginia*, 225 U. S. 264, 269 (1912);

Western Union Telegraph Company v. *Crovo*, 220 U. S. 364, 366 (1911).

II.

Petitioners failed to exhaust the appellate remedies provided by state procedure.

Petitioners' failure to apply to the Court of Appeals for leave to appeal to that court, after dismissal of their attempted appeal taken "as of right" (Civil Practice Act, Section 592, subd. 5(b) (ii)), precludes issuance of a writ of certiorari. It is the purpose of the Judiciary Act "that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted. *Fisher* v. *Perkins,* 122 U. S. 522; *McComb* v. *Commissioners,* 91 U. S. 1, 2; *McMaster* v. *Gould,* 276 U. S. 284; *Southern Electric Co.* v. *Stoddard,* 269 U. S. 186; *Stratton* v. *Stratton,* 239 U. S. 55; *Mullen* v. *Western Union Beef Co.,* 173 U. S. 116; *Great Western Telegraph Co.* v. *Burnham,* 162 U. S. 339." *Gorman* v. *Washington University,* 316 U. S. 98, 100 (1942).

Even were the petition considered as one for a writ to the Appellate Division to review its judgment of affirmance, jurisdiction would not exist to issue the writ. The petitioners nevertheless could have applied to the Court of Appeals for leave to appeal to that court after dismissal of their appeal taken "as of right", and the judgment of the Appellate Division could not become final within the meaning of Judicial Code, Section 1257(3) until such application had been made and denied. See:

Stratton v. *Stratton,* 239 U. S. 55 (1915);
Matthews v. *Huwe,* 269 U. S. 262, 265, 266 (1925);
Andrews v. *The Virginian Railway Company,* 248 U. S. 272 (1918);
American Railway Express Company v. *Levee,* 263 U. S. 19, 20, 21 (1923).

III.

The decision of the Court of Appeals that no constitutional question was properly raised in the courts below is conclusive.

This Court will accept as conclusive the decision of the Court of Appeals that "no constitutional question was properly raised in the courts below". Judicial Code, Section 1257(3) requires that the claim of constitutional right be "especially set up" in the state courts. "This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, *Mutual Life Insurance Co.* v. *McGrew,* 188 U. S. 291, 308, and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this Court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. *Central Vermont Railway Co.* v. *White,* 238 U. S. 507; *John, Guardian,* v. *Paullin,* 231 U. S. 583; *Erie R. R. Co.* v. *Purdy,* 185 U. S. 148; *Layton* v. *Missouri,* 187 U. S. 356." *Atlantic Coast Line R. R. Co.* v. *Mims,* 242 U. S. 532, 535 (1916).

No suggestion is or could be made that the holding of the Court of Appeals in this case was framed to evade consideration of the federal right now asserted. See *Hartford Life Insurance Company* v. *Johnson,* 249 U. S. 490, 493 (1919).

IV.

The decision of the Court of Appeals that no constitutional question was properly raised in the courts below is correct.

Even if the decision of the Court of Appeals were not conclusive, its holding that no constitutional question was properly raised in the lower courts is demonstrably correct according to the decisions of this Court and of the Court of Appeals.

Petitioners claim that they "pleaded as a defense the facts which form the basis of the question upon which review is sought" in their answers to the complaint, as follows (Petition, pp. 4-5, R. 101-102):

> "31. Canon 27 of the Diocese of Long Island (See Paragraph 'Twentieth' hereof and Exhibit I) provides the sole remedy for neglect or refusal on the part of the Congregation to comply with a judgment of the Bishop rendered thereunder and that such sole remedy is to deprive the Congregation of a representative to the diocesan convention until they submit.
>
> 32. The Congregation refuses to comply with the purported judgment of the defendant Bishop.
>
> * * * * *
>
> 34. A civil Court, therefore, has no power to grant any other, further or different relief in the premises."

These allegations did not present, or even purport to present, any constitutional question. They were simply a plea that a particular ecclesiastical remedy was exclusive. They were not a plea that the exercise of civil jurisdiction by the trial court would be unconstitutional, nor that the exercise of such jurisdiction would violate any of peti-

tioners' constitutional rights. See *Wilson* v. *Cook,* 327 U. S. 474, 480-481 (1946).

This Court has held that an attack upon a State statute as violative "of the constitution of the United States" is too general to raise a federal constitutional question. *Herndon* v. *Georgia,* 295 U. S. 441, 442, 443 (1935), citing *Maxwell* v. *Newbold,* 18 How. 511, 516 (1855); *Messenger* v. *Mason,* 10 Wall. 507, 509 (1870); *Capital City Dairy Company* v. *Ohio,* 183 U. S. 238, 248 (1902); *Harding* v. *Illinois,* 196 U. S. 78, 85, 86-88 (1904). *A fortiori* the instant pleading which makes no mention of the constitution, is insufficient.

The rule of pleading obtaining in the State of New York and approved by this Court, requires specific reference to the clause of the constitution relied upon in assertion of a constitutional right. *Erie Railroad Company* v. *Purdy,* 185 U. S. 148 (1902), affirming 162 N. Y. 42. There is no such reference here.

The learned opinion of the trial court (R. 482-499, 194 Misc. 1006) contains internal evidence that no constitutional question was presented or passed upon; for although the issues of law and of fact are there considered with meticulous care, the decision is entirely devoid of statement or intimation that constitutional questions were presented or that constitutional rights are involved.

Indeed, the inference is warranted that petitioners not only deliberately refrained from asserting the claim that exercise of jurisdiction by the trial court would infringe their constitutional rights, but they foreclosed themselves from so doing by taking precisely the opposite position. For, in their pleadings they then and there invoked that very jurisdiction by the demand in their counterclaims (R. 70, 103) for judicial declaration that the Bishop's judgment was illegal and for a permanent injunction

against its enforcement. The belated assertion of constitutional right is an obvious afterthought.

Petitioners say that the constitutional privilege of religious freedom was asserted in the brief of petitioners Reynolds and Mason in the Appellate Division. A single sentence is relied upon as asserting the constitutional right. The brief, after repeating the contention made in the trial court that the ecclesiastical remedy of Canon 27 for disobedience of the Bishop's judgment is exclusive, commented that the trial court, in holding that the Bishop's judgment was conclusive, had said that the constitution "has secured religious liberty from the invasion of the civil authority". Petitioners then added—and this is the sentence upon which they rely as raising a constitutional question—"A grosser invasion of religious liberty is difficult to imagine" (Petition pp. 14-15).

Even under the liberal practice prevailing in the State of New York which permits the Court of Appeals to review a constitutional question if properly presented to the Appellate Division and necessarily involved in its decision (*Jongebloed* v. *Erie Railroad Company,* 296 N. Y. 912 (1947)), this fleeting and superficial commentary upon the reasoning of the trial court, contained in an isolated sentence in the brief of the petitioners Mason and Reynolds, but not in the brief of the petitioners Melish, falls far short of meeting the requirement that a constitutional question must be clearly and distinctly presented in the state courts before this Court may review by certiorari. Indeed, this Court has said that a claim of jurisdiction may not be sustained "by reference to briefs and statements which are not part of the record." *Lynch* v. *New York,* 293 U. S. 52, 54 (1934).

Petitioners Melish did not take the position in the Appellate Division that the constitutional privilege of freedom

of religion barred the civil courts from exercising jurisdiction. To the contrary, they argued that there is a remedy provided by the Canons of the Protestant Episcopal Church for a rector's disobedience of his bishop's judgment, *i.e.* an ecclesiastical trial for divestment of his priesthood; and that until this remedy had been exhausted in the instant case there was no right of resort to the civil courts (R. p. 583). It was, of course, the inevitable implication of this argument that *after* the ecclesiastical remedy had been resorted to and the disobedient rector deprived of his priesthood, resort to the civil courts could then be had to restrain him from continuing occupancy of church property. In short, in their brief in the Appellate Division petitioners Melish construed the allegations of their answer filed with the trial court as a claim, not that resort to the civil courts was *unconstitutional,* but only that it was *premature.*

Petitioners Melish are no longer represented by counsel who advanced this argument on their behalf. Their position has changed with their change of lawyers. They now contend that the civil courts do not, and never will, have constitutional power to exercise jurisdiction in the case at bar. Clearly, this was not their contention in the courts below.

No constitutional question having been raised in the State courts, as required by Judicial Code Section 1257(3), this Court is without jurisdiction to issue a writ of certiorari as prayed for in the petition.

V.

The so-called "constitutional question" which petitioners ask this Court to review is unsubstantial and frivolous.

Finally, even were we to assume that the constitutional question which petitioners ask this Court to review was properly presented below (Petition, p. 2), the question is so unsubstantial, and indeed frivolous, as not to merit review by this Court. *Seaboard Air Line Railway Company* v. *Watson,* 287 U. S. 86, 92 (1932); *Deming* v. *Carlisle Packing Company,* 226 U. S. 102 (1912); *Congress of Industrial Organizations* v. *McAdory,* 325 U. S. 472 (1945).

Petitioners have abandoned their contention below that the Bishop's judgment is not in accord with the Canons of the Church and is illegal. They now necessarily concede that the judgment of the Bishop dissolving the pastoral relations is canonically correct and legally conclusive. By the same token, they cannot deny that their refusal to obey the Bishop's judgment is wrongful.

Nevertheless, they contend that the constitutional guaranty of freedom of religion protects the deposed Rector in his continued occupancy of the rectory and in his continued participation, as a member of the Vestry and trustee of the Church, in the management of its temporal and corporate affairs. They must necessarily contend that this same constitutional guaranty precludes the courts, whether at the suit of the Bishop, or the Congregation, or the Vestry, from granting any relief whatever against misuse of church property by one who has become a usurper. Petitioners claim that the only remedies available in this situation are ecclesiastical remedies; that the courts may not intervene, although their intervention is obviously indispensable for the protection of the Church against the misuse of its temporalities and property; that the intervention of the

courts below constitutes a violation of the constitutional guaranty of freedom of religion and the American principle of separation of church and state.

If petitioners are correct in this contention, the courts would be constitutionally powerless to prevent this Rector and a section of his Congregation from transforming this Protestant Episcopal Church into a Roman Catholic Church or a Jewish Synagogue or a Shinto Temple, simply because, so petitioners claim, ecclesiastical remedies are exclusive. A mere statement of this proposition reveals its utter absurdity.

Prior to the enactment by the New York Legislature of the Religious Corporations Law in 1875, "the majority of the members of a religious corporation could change its denominational character and devote the church property to an entirely different religious faith than that for which it was originally dedicated. (*Robertson* v. *Bullions,* 11 N. Y. 243, 263-264; *Petty* v. *Tooker,* 21 N. Y. 267; *Gram* v. *Evangelical Lutheran Soc.,* 36 N. Y. 161.) For the public good, the Legislature decreed that the trustees of religious corporations, irrespective of the wishes of the majority of the local congregation, must administer the temporalities in accordance with the discipline, rules and usages of the ecclesiastical body, if any, to which the corporation was subject. (Religious Corporations Law, §5.)" *Saint Nicholas Cathedral* v. *Kedroff,* 302 N. Y. 1 (1950).

Petitioners' present contention overlooks completely the fact that the respondent church is not only a religious society but a religious corporation organized and existing by virtue of the Religious Corporations Law of the State of New York. Their contention is also founded upon a completely erroneous misconception of the nature of the judgment entered below. While the judgment does enforce the decree of the Bishop, it does so only incidentally, and

it enforces primarily the provisions of the Religious Corporations Law, particularly Sections 4, 5 and 41.

Section 4 provides that "all the temporalities and property of an unincorporated church, or of any unincorporated religious society, body, association or congregation, shall, on the incorporation thereof, become the temporalities and property of such corporation. * * * " Section 5 requires "trustees of every religious corporation" to administer "all the temporalities and property * * * belonging to the corporation * * * in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject * * * ". Section 41 provides that the duly elected churchwardens and vestrymen of a Protestant Episcopal Church, such as the plaintiff religious corporation, "together with the rector, * * * shall * * * be the trustees of such church * * * ".

The religious society in accordance with the usages and rules of which the property of this religious corporation must be administered, is the Protestant Episcopal Church in the United States of America. "It is contrary to the general canons of that church and the canons of the diocese * * * that the pulpit of an Episcopal church be occupied by a rector not duly elected and instituted, or that its rectory should be possessed by him." *Fiske* v. *Beaty,* 206 App. Div. 349, 358 (1923), affirmed 238 N. Y. 589.

It follows that the courts below, in declaring that petitioner John Howard Melish ceased to be Rector on April 4, 1949 and in enjoining him from thereafter acting as a corporate trustee and occupying or administering the corporate property, simply enforced the foregoing provisions of the Religious Corporations Law of the State, which it is not only their right, but their constitutional duty to do. If, by so doing, they incidentally gave force to the Bishop's judgment, this is only because the discipline, rules and usages of the Protestant Episcopal Church, upon which

the Bishop's judgment is based, have been incorporated into and made a part of the Religious Corporations Law of the State.

Since petitioners do not now contend, and have never contended, that the applicable provisions of the Religious Corporations Law are unconstitutional, their enforcement by the courts below was not and cannot be a deprivation of petitioners' constitutional rights.

All other considerations apart, petitioners' claim that the judgment of the trial court was unconstitutional because the ecclesiastical remedy is "exclusive" is plainly without merit or substance.

Canon 27 of the Diocese of Long Island, in accordance with which the Bishop rendered his judgment, appears at R. 71-73. Petitioner John Howard Melish in his letter to the Bishop (Defendant's Ex. A, R. 532) himself described this Canon as granting "extraordinary and absolute power" to the Bishop.

After providing in substance that if a vestry requests a dissolution of the pastoral relation the Bishop "shall be the ultimate arbiter and judge" in the matter, the Canon goes on to provide (R. 72-73):

> *"Dissolution of the relationship.*
>
> Sec. IV. (1) If the final judgment be a recommendation that the pastoral relation be dissolved and that titles be relinquished by the Clergyman and he shall refuse to comply with the same within 30 days after the decision has been made known to him, the Bishop may declare the canonical dissolution of all connection between the parties.
>
> *Penalty for failure to comply.*
>
> (2) And if the Vestry or Congregation refuse or neglect to comply on their part with such decision or

judgment, the Church or Congregation shall be prohibited from a representation in Diocesan Convention until they submit thereto."

By wrenching the last quoted sentence out of its context, petitioners now make the extraordinary argument that because the Canon provides that a disobedient *congregation* may be punished by denial of representation in the Diocesan Convention, therefore a disobedient *rector* apparently cannot be touched by any civil court. This is a perfect *non-sequitur*. The preceding sentence (Sec. IV (1)) makes it plain that the Bishop can declare the "canonical dissolution" of the pastoral relation; and under well settled principles of law, the Bishop's decision in this regard is not subject to reexamination on the merits by a civil court. *Watson* v. *Jones*, 80 U. S. 679 (1871); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U. S. 1, 16 (1929).

How the ecclesiastical penalty directed by Section IV (2) against the congregation becomes a constitutional bar under the First Amendment to any civil action against an ex-rector who persists in occupying a position from which he has been lawfully removed is beyond our comprehension.

CONCLUSION

The petition should be denied.

Dated: New York, N. Y.
January 24, 1951.

Respectfully submitted,

THEODORE KIENDL,
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Attorneys for Respondents other than James Pernette De Wolfe.